

§ 65.450 Net income.

* * * * *

(d) Except for the allowance for funds used during construction, reasonable charitable deductions and interest related to customer deposits, the amounts recorded as nonoperating income and expenses and taxes (Accounts 7300–7450) and interest and related items (Accounts 7500–7540) and extraordinary items (Accounts 7600–7640) shall not be included unless this Commission specifically determines that particular items recorded in those accounts shall be included.

3. Section 65.820(a) is revised to read as follows:

§ 65.820 Included items.

(a) *Telecommunications Plant*. The interstate portion of all assets summarized in Account 2001 (Telecommunications Plant in Service) and Account 2002 (Property Held for Future Use), net of accumulated depreciation and amortization, and Account 2003 (Telecommunications Plant Under Construction), and, to the extent such inclusions are allowed by this Commission, Account 2005 (Telecommunications Plant Adjustment), net of accumulated amortization. Any interest cost for funds used during construction capitalized on assets recorded in these accounts shall be computed in accordance with the procedures in § 32.2000(c)(2)(x) of this chapter.

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DEPARTMENT OF TRANSPORTATION**Research and Special Programs Administration****49 CFR Part 107**

[Docket No. HM–207D; Amdt. No. 107–33]

RIN 2137–AC60

Hazardous Materials Regulations; Penalty Guidelines

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Final rule.

SUMMARY: In this final rule, RSPA is publishing its hazardous material transportation enforcement civil penalty guidelines. This action provides the regulated community and the general public with guidance as to the factors RSPA considers in its hazmat penalty assessment process.

EFFECTIVE DATE: This rule is effective April 7, 1995.

FOR FURTHER INFORMATION CONTACT: John J. O'Connell, Jr., Office of Hazardous Materials Enforcement, (202) 366–4700; or Edward H. Bonekemper, III, Office of Chief Counsel, (202) 366–4400, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:**I. Background**

In response to a request contained in Senate Report 103–150 that accompanied the Department of Transportation and Related Agencies Appropriations Act, 1994, RSPA is publishing its hazardous material transportation (hazmat) enforcement civil penalty guidelines as an appendix to its regulations. This action will provide the regulated community and the general public with information concerning how RSPA generally begins its hazmat penalty assessment process and types of information that respondents in enforcement cases should provide to justify reduction of proposed penalties.

RSPA enforcement personnel and attorneys use these guidelines as a partial means of determining a baseline civil penalty for selected violations of the Hazardous Materials Regulations (HMR; 49 CFR Parts 171–180), or the Federal hazardous material transportation law (Federal hazmat law), 49 U.S.C. 5101 *et seq.* (formerly the Hazardous Materials Transportation Act (HMTA), 49 App. U.S.C. 1801 *et seq.*).

Because these guidelines are non-binding and are periodically updated, they are being published as an informational appendix to the enforcement regulations, Subpart D of Part 107 in Title 49 of the Code of Federal Regulations (CFR). They are being published without public notice or comment because they are merely informational, are not finally determinative of any issues or rights, and do not have the force of law. Because these guidelines are merely a general statement of agency policy and practice and because they impose no requirements, no notice of proposed rulemaking is necessary.

This rule publishes the guidelines as they existed on January 18, 1995. In any particular case, the Office of Hazardous Materials Enforcement will use the version of the guidelines in effect at the time of its referral of a matter to the Office of the Chief Counsel for possible issuance of a notice of probable violation (NOPV). However, since the guidelines are not legally binding, later changes in the guidelines may be

considered in a particular case before a final order is issued.

On November 16, 1990, Congress amended the HMTA by passing the Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA; Public Law 101–615); in HMTUSA, Congress increased the maximum penalties for HMTA and HMR violations from \$10,000 to \$25,000 per violation per day. The guidelines reflect the culmination of a five-year program under which RSPA increased the baseline penalty for most violations by 20 percent per year (on November 16 of each year between 1990 and 1994) to effect Congress' 1990 increase of the maximum penalty for hazmat violations.

These guidelines are a preliminary assessment tool used by RSPA personnel, and they create no rights in any party. They contain baseline amounts or ranges for violations that frequently have been cited in RSPA hazmat NOPVs. When a violation not described in the guidelines is encountered, it sometimes is possible to determine a baseline penalty by analogy to a similar violation in the guidelines.

Even when the guidelines are applicable to a violation, the use of the guidelines is only a starting point. They promote consistency and generally are used to provide some standard for imposing similar penalties in similar cases. However, no two cases are identical, and ritualistic use of the guidelines would produce arbitrary results and, most significantly, would ignore the statutory mandate to consider several specific assessment criteria. Therefore, regardless of whether the guidelines are used to determine a baseline amount for a violation, RSPA enforcement and legal personnel must apply the statutory assessment criteria to all relevant information in the record concerning any alleged violation and the apparent violator. These criteria are in 49 U.S.C. 5123 and 49 CFR 107.331.

The criteria that RSPA applies are the nature, extent, circumstances, and gravity of each violation; the degree of the violator's culpability; the violator's history of prior violations (if any); the violator's ability to pay; any effect of the penalty on the violator's ability to continue to do business, and other matters that justice requires. The baseline amount or range is an initial reflection of the nature, extent, circumstances, and gravity of the violation as compared with other types of violations. This amount then may be modified on the basis of case-specific information on nature, extent, circumstances, and gravity, as well as information with respect to the other enumerated factors.

Corrective action taken by a violator to prevent a recurrence of similar violations is a major consideration under "other matters that justice requires." Application of the statutory assessment criteria may increase or decrease the baseline penalty amount or range. The two economic criteria, however, are only used to decrease penalties and are not used to increase penalties. Conversely, a violator's history of prior violations is used only to increase a penalty.

As discussed more fully below, the guidelines are not binding on RSPA or Department of Transportation personnel. Enforcement personnel and staff attorneys generally use the guidelines as a starting point for penalty assessment. However, they, the Chief Counsel, administrative law judges (ALJs), and the RSPA Administrator may deviate from the guidelines where appropriate, and are legally bound only by the statutory assessment criteria.

RSPA is aware of a recent decision by the United States Court of Appeals for the District of Columbia Circuit ruling that a Federal Communications Commission (FCC) civil penalty schedule used in its forfeiture proceedings may not be published as a policy statement, but must be issued as a rule in accordance with the public notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. 553 (b), (c). *United States Telephone Ass'n v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994). RSPA has reviewed the Court's decision, as well as the FCC schedule and procedures that were the subject of the ruling, and believes that the ruling is not applicable to the RSPA guidelines.

A respondent has no right to be heard in an FCC forfeiture proceeding other than by the FCC Bureau that initiates the forfeiture action. The Bureau begins a proceeding by issuing a forfeiture order. 47 CFR 1.80(f). The respondent is permitted a written reply, and the Bureau issues a final administrative determination. *Id.* A hearing before an ALJ may be held, but solely at the Bureau's discretion, 47 CFR 1.80(g); the regulations themselves state that normally the matter will be heard by an ALJ only when it arises in conjunction with other proceedings for which a formal hearing is required, *id.* When a hearing is held, the decision of the ALJ is subject to Bureau review and approval. 47 CFR 1.273, 1.282. The FCC schedule governs the Bureau's penalty determination, whether following a respondent's written reply or in reviewing an ALJ decision. Thus, a respondent, even where it fully exercised its procedural rights, would

be assessed a penalty determined according to a methodology that it had no opportunity to contest. It is firmly established that a standard must be issued as a rule if it is "finally determinative" of a respondent's obligations. *E.g., Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537 (D.C. Cir. 1986).

In contrast, the RSPA guidelines are used by the RSPA Office of the Associate Administrator for Hazardous Materials Safety (OHMS), at a staff, level to assist in developing recommended proposed penalties in enforcement cases. On receiving an NOPV setting forth the penalty, a respondent may demand a formal hearing before an ALJ. 49 CFR 107.319. The OHMS and RSPA's Office of Chief Counsel will employ the guidelines to determine the penalty for which it will argue before the ALJ; nonetheless, the ALJ is not bound by the guidelines, and retains his or her essential discretion.

An ALJ decision that is not appealed is a final administrative action. 49 CFR 107.323. A decision that is appealed is reviewed by the RSPA Administrator. 49 CFR 107.325. On review of an ALJ decision, the Administrator, as well, is not bound by the OHMS guidelines. Accordingly, the guidelines do not "finally determin[e]" a respondent's penalty obligation; a respondent that objects to the proposed penalty has the right to contest the penalty fully before the administrative decisionmaker. The administrative decisionmaker remains "free to exercise his [or her] informed discretion." *Guardian Fed. Savings & Loan Ass'n v. Federal Savings & Loan Ins. Corp.*, 589 F.2d 658, 666, 668 (D.C. Cir. 1978).

In addition, the FCC schedule and the RSPA guidelines differ significantly in the degree to which they permit deviation in their use. The *USTA* court, citing the proposition that the policy/rule distinction turns on "an agency's intention to bind itself to a particular legal policy position," 28 F.3d 1234, found that in over 300 cases, the FCC followed its fine schedule essentially without exception, *id.* at 1234-35.

The OHMS guidelines, as opposed to a penalty schedule, consist of a listing of violations and the baseline penalty, or range of penalties, proposed for each as of November 16, 1994, as well as an explanation of the methodology OHMS generally uses to modify the baseline proposed penalty on the basis of case-specific factors required to be considered under 49 U.S.C. 5123(c) and 49 CFR 107.331. The guidelines presuppose flexibility in their application; beyond that, the OHMS or, where respondent has waived formal

hearing, the order of the Chief Counsel imposing a penalty, often has gone beyond the boundaries of the guidelines as warranted by particular evidence from or arguments of a respondent. RSPA expects to publish revised guidelines annually.

II. Rulemaking Analyses and Notices

Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule is not considered a significant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was not subject to review by the Office of Management and Budget. This rule is not significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034). The economic impact of this final rule is minimal to the extent that preparation of a regulatory evaluation is not warranted.

Executive Order 12612

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12612 ("Federalism"). The Federal hazardous materials transportation law contains an express preemption provision (49 U.S.C. 5125(b)(1)) that preempts State, local, and Indian tribe requirements on certain covered subjects unless they are "substantively the same" as the HMR. Covered subjects are:

- (i) The designation, description, and classification of hazardous materials;
- (ii) The packing, repacking, handling, labeling, marking, and placarding of hazardous materials;
- (iii) The preparation, execution, and use of shipping documents pertaining to hazardous materials and requirements respecting the number, content, and placement of such documents;
- (iv) The written notification, recording, and reporting of the unintentional release in transportation of hazardous materials; or
- (v) The design, manufacturing, fabrication, marking, maintenance, reconditioning, repairing, or testing of a package or container which is represented, marked, certified, or sold as qualified for use in the transportation of hazardous materials. The Federal hazardous materials transportation law (49 U.S.C. 5125(b)(2)), as amended, provides that if DOT issues a regulation concerning any of the covered subjects after November 16, 1990, DOT must determine and publish in the **Federal Register** the effective date of Federal preemption. The effective date may not be earlier than the 90th day following

the date of issuance of the final rule and not later than two years after the date of issuance. This final rule is an informational appendix and imposes no requirements. Thus, preparation of a federalism assessment is not warranted.

Regulatory Flexibility Act

I certify that this final rule will not have a significant economic impact on a substantial number of small entities. This rule applies to shippers and carriers of hazardous materials, some of which are small entities; however, there is no economic impact.

Paperwork Reduction Act

There are no new information requirements in this final rule.

List of Subjects in 49 CFR Part 107

Administrative practices and procedure, Hazardous materials transportation, Packaging and containers, Penalties, Reporting and recordkeeping requirements.

In consideration of the foregoing, 49 CFR part 107 is amended as follows:

PART 107—HAZARDOUS MATERIALS PROGRAM PROCEDURES

1. The authority citation for part 107 continues to read as follows:

Authority: 49 U.S.C. 5101–5127, 44701; 49 CFR 1.45 and 1.53.

2. Appendix A is added to subpart D of part 107 to read as follows:

Appendix A to Subpart D of Part 107—Guidelines for Civil Penalties

I. This appendix sets forth the guidelines used by the Office of Hazardous Materials Safety (as of January 18, 1995) in making initial baseline determinations for recommending civil penalties. The first part of these guidelines is a list of baseline amounts or ranges for probable violations frequently cited in enforcement reports referred for action. Following the list of violations are general guidelines used by OHMS in making initial penalty determinations in enforcement cases.

II. List of Frequently Cited Violations

| Violation description | Section or cite | Baseline assessment |
|--|---------------------|---------------------|
| Part 107—Requirements | | |
| Failure to register as a carrier or shipper of hazardous material | 107.608 | \$1,500 |
| Part 171—Requirements | | |
| Failure to inform foreign shipper and U.S. forwarding agent of 49 CFR requirements applying to a shipment within the U.S. | 171.12(a) | 7,200 |
| Failure to file a DOT 5800.1 Hazardous Materials Incident Report within 30 days following an unintentional release of hazardous materials in transportation. | 171.16 | 3,100 |
| Part 172—Requirements | | |
| Shipping Papers (§§ 172.200–172.205): | | |
| Failure to execute a shipping paper for a shipment of hazardous materials | 172.201 | 5,200 |
| Failure to follow one or more of the three approved formats for listing hazardous materials on a shipping paper. | 172.201(a)(1) | 1,200 |
| Failure to include a proper shipping name in the proper shipping description | 172.202 | 1,850 |
| Failure to include a hazard class/division number in the proper shipping description | 172.202 | 1,850 |
| Failure to include the identification number in the proper shipping description | 172.202 | 1,200 |
| Using an incorrect identification number in the proper shipping description | 172.202 | 1,850 |
| Using an incorrect identification number in the proper shipping description, that changes the required response information. | 172.202 | 2,500 |
| Using a shipping description that is mostly correct, but includes extra or incorrect words | 172.202 | 1,000 |
| Using a shipping description that includes additional unauthorized information | 172.202 | 850 |
| Using a proper shipping description not in required sequence | 172.202 | 500 |
| Using a shipping description that is missing two required elements | 172.202 | 3,100 |
| Using a shipping description where more than two required elements are missing | 172.202 | 4,300 |
| Using a shipping name and hazard class that is incorrect, such that the material is misdescribed. | 172.202 | 3,700 |
| Using a shipping name and hazard class that is incorrect, such that a material is misclassified. | 172.202 | 6,200 |
| Failure to include the total quantity of hazardous material covered by a shipping description. | 172.202(c) | 430 |
| The letters “RQ” are not used in the shipping description to identify materials that are hazardous substances. | 172.203(c)(2) | 500 |
| Failure to include a required technical name in parentheses for a listed generic or “n.o.s.” material. | 172.203(k) | 1,200 |
| Failure to list an exemption number as part of the required shipping description | 172.203(a) | 1,200 |
| Failure to include the required shipper’s certification on a shipping paper | 172.204(a) | 1,800 |
| Failure to execute the required shipper’s certification on a shipping paper | 172.204 | 1,000 |
| Emergency Response Information Requirements (§§ 172.600–172.604): | | |
| Providing or listing incorrect emergency response information with or on a shipping paper (if significant difference in response). | 172.602 | 2,600 |
| Providing or listing incorrect emergency response information with or on a shipping paper (if no significant difference in response). | 172.602 | 1,300 |
| Failure to include an emergency response telephone number on a shipping paper | 172.604 | 2,600 |
| Failure to have the emergency response telephone number monitored while a hazardous material is in transportation. | 172.604 | 1,300 |
| Listing a fraudulent emergency response telephone number on a shipping paper | 172.604 | 3,700 |

| Violation description | Section or cite | Baseline assessment |
|--|------------------|---------------------|
| Listing an emergency response telephone number on a shipping paper that is not working or is incorrect. | 172.604 | 1,300 |
| Failure to provide required technical information when the listed emergency response telephone number is contacted. | 172.604 | 2,600 |
| Package Marking Requirements (§§ 172.300–172.338): | | |
| Failure to mark the required identification number on a package | 172.301(a) | 1,200 |
| Marking an incorrect identification number on a package | 172.301(a) | 1,850 |
| Marking an incorrect identification number on a package that changes the appropriate emergency response information. | 172.301(a) | 2,500 |
| Failure to mark the required shipping name on a package | 172.301(a) | 2,500 |
| Failure to mark the required shipping name and identification number on a package | 172.301(a) | 4,200 |
| Marking a package with an incorrect shipping name and identification number | 172.301(a) | 5,000 |
| Marking a package with an incorrect shipping name and identification number that does not affect emergency response information/actions. | 172.301(a) | 2,500 |
| Failure to include the required technical name(s) in parentheses for a listed generic or "n.o.s." entry. | 172.301(c) | 1,200 |
| Failure to mark a package containing liquid hazardous materials with required orientation marks. | 172.312 | 3,700 |
| Failure to mark a package containing liquid hazardous materials with required orientation marks, when inside packagings have vented closures. | 172.312 | 4,200 |
| Package Labeling Requirements (§§ 172.400–172.450): | | |
| Failure to label a package, when required | N/A | 4,300 |
| Placing a label in a package when the label represents a hazard other than the actual hazard presented by the hazardous material in the package. | N/A | 5,000 |
| Placing a label not conforming to size requirements on a package | N/A | 1,000 |
| Placing a label on a package that does not contain a hazardous material | 172.401(a) | 1,300 |
| Placing a label that does not meet color specification requirements on a package | N/A | 600 to 2,500 |
| Failure to place a required subsidiary label on a package, when required | N/A | 2,500 |
| Failure to provide an appropriate division number on an explosive label | N/A | 5,200 |
| Placarding Requirements (§§ 172.500–172.560): | | |
| Failure to placard a freight container containing hazardous materials | N/A | 500 to 7,500 |
| Failure to properly placard a freight container containing Division 1.1, 1.2, or 1.3 (Class A or B) explosives. | 172.504 | 8,650 |
| Training Requirements (§§ 172.700–172.704): | | |
| Failure to train hazmat employees in the three required areas | 172.702 | 1,500 to 25,000 |
| Failure to train hazmat employees in one of the three required areas | 172.702 | 500 and up |
| Failure to train hazmat employees in two of the three required areas | 172.702 | 1,000 and up |
| Failure to maintain training records | 172.702 | 500 and up |

Part 173—Requirements

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|---|-------------------------------------|----------------|
| Overpack Requirements (§ 173.25): | | |
| Failure to mark an overpack with a statement indicating that the inside packages comply with prescribed specifications when specification packaging is required. | 173.25(a)(4) | 3,100 |
| Reconditioner Requirements (§ 173.28): | | |
| Representing, marking, or certifying a drum as a reconditioned DOT packaging, when the drum did not meet a DOT specification. | 173.28(m)(3)(ii) ¹ | 5,200 to 7,200 |
| Marking an incorrect registration number on a reconditioned packaging | 173.28(m)(3)(ii) ¹ | 1,550 |
| Failure to properly conduct alternate leakage test | 173.28(m)(2) ¹ | 5,000 |
| Representing, marking, or certifying a drum as altered from one specification to another, when the drum had not actually been altered. | 173.28(o)(1) ¹ | 1,000 |
| IM Portable Tank Requirements (§ 173.32c): | | |
| Offering a hazardous material for transportation in an IM portable tank equipped with bottom outlets, when the material contained is prohibited from being offered in this type of packaging. | 173.32c(a) | 5,200 to 7,200 |
| Offering an IM portable tank for transportation that has not been visually inspected within last 2½ years per 173.32b(b). | 173.32c(c) | 5,000 |
| Offering an IM portable tank for transportation that has not been hydrostatically retested in last five years per 173.32b(a). | 173.32c(c) | 6,200 |
| Offering an IM portable tank for transportation that has not been visually or hydrostatically tested as required, or failing to remove the safety relief valves during testing. | 173.32c(c) | 12,500 |
| Failure to provide the required outage for a shipment of hazardous materials, that results in the release of hazardous materials. | 173.32c(k) | 15,500 |
| Cylinder Retesters (§§ 173.23, 173.34, and 173.302): | | |
| Failure to remark an aluminum exemption cylinder as a DOT 3 AL | 173.23(c) | 2,100 |
| Certifying or marking as retested a nonspecification cylinder | 173.34 | 5,200 to 7,200 |
| Marking a cylinder in or on the sidewall area when not permitted by the applicable specification. | 173.34(c)(1) | 8,650 |
| Failure to maintain legible markings on a cylinder | 173.34(e) | 1,200 |
| Failure to perform hydrostatic retesting at the minimum of 5/3 times the service pressure, or at the minimum specified test pressure. | 173.34(e) | 2,100 to 5,200 |
| Failure to perform visual external examination | 173.34(e)(1) | 3,100 |

| Violation description | Section or cite | Baseline assessment |
|--|----------------------------|---------------------|
| Failure to perform visual internal examination | 173.34(e)(1) | 3,600 |
| Failure to perform both visual external and visual internal examinations | 173.34(e)(1) | 4,200 |
| Inability to conduct a complete visual examination due to: excess paint build-up on a cylinder; failure to remove banding; failure to remove a permanent attachment; or failure to remove a plastic attachment that has torn or cracked. | 173.34(e)(1) | 3,100 |
| Failure to have a retester's identification number (RIN) | 173.34(e)(1)(i) | 3,600 |
| Failure to have current authority due to failure to renew a retester's identification number. | 173.34(e)(1)(i) | 2,500 |
| Failure to have a retester's identification number and marking another RIN on a cylinder. | 173.34(e)(1)(i) | 7,200 |
| Marking a RIN before successfully completing a hydrostatic retest. | 173.34(e)(1)(ii) | 3,100 |
| Marking a cylinder as having been retested without performing retest | 173.34(e)(1)(ii) | 8,650 |
| Performing hydrostatic retesting without demonstrating the accuracy of the testing equipment. | 173.34(e)(3) | 2,100 to 5,200 |
| Failure to hold hydrostatic test pressure for 30 seconds or sufficiently longer to allow for complete expansion. | 173.34(e)(3) | 3,100 |
| Failure to perform a second retest, after equipment failure, at a pressure of 10% more or 100 psi more, whichever is less. | 173.34(e)(3) | 3,100 |
| Exceeding 90% of test pressure prior to conducting test | 173.34(e)(3) | 850 |
| Failure to condemn a cylinder with permanent expansion of 10% or greater (5% for certain exemption cylinders); failure to condemn cylinders with evidence of internal or external corrosion, denting, bulging, or rough usage. | 173.34(e)(4) | 6,000 |
| Marking an FRP cylinder with steel stamps in the FRP area of the cylinder such that the integrity of the cylinder is compromised. | Applicable Exemption | 8,650 |
| Failure to keep records of cylinder reinspection and retest | 173.34(e)(5) | 4,200 |
| Failure to keep accurate records of cylinder reinspection and retest | 173.34(e)(5) | 1,000 to 3,100 |
| Improper marking of the RIN or retest date on a cylinder | 173.34(e)(5) | 1,550 |
| Marking a DOT 3HT cylinder with a steel stamp other than a low-stress steel stamp | 173.34(e)(13)(iv) | 5,200 and up |
| Marking a "+" sign on a cylinder without determining the average or maximum wall stress. | 173.302(c)(3) | 3,000 to 4,300 |
| Representing, marking, or certifying a cylinder as meeting the requirements of an exemption, when the cylinder was not maintained or retested in accordance with the exemption. | N/A | 4,300 to 6,000 |
| Rebuilder Requirements (§ 173.34): | | |
| Representing a DOT-4 series cylinder as meeting the requirements of the Hazardous Materials Regulations without being authorized to do so by the Associate Administrator for Hazardous Materials Safety. | 173.34(l) | 7,200 |

Part 178—Requirements

| | | |
|--|---------------------|-----------------|
| Third-Party Packaging Certifiers (General): | | |
| With testing completed, TPPC's certification directs manufacturer to improperly mark a packaging (e.g., steel drum to be marked UN 4G). | N/A | 2,100 |
| Manufacturers (General): | | |
| Failure to conduct drop testing from required distance | N/A | 4,200 |
| Manufacturing, marking, certifying, or selling a package marked to a specification, UN standard, or an exemption when applicable requirements are not met. | N/A | 5,200 to 8,650 |
| Certifying a packaging as meeting a UN standard when design qualification testing was not performed. | N/A | 6,000 to 10,800 |
| Failure to conduct periodic testing on UN standard packaging | N/A | 5,000 to 8,650 |
| Failure to properly conduct design qualification or periodic retesting for UN standard packaging. | N/A | 4,200 |
| Marking, or causing the marking of, a packaging with the symbol of a manufacturer or packaging certifier other than the company that actually manufactured or certified the packaging. | N/A | 7,200 |
| Failure to keep and maintain records of design qualification testing | 178.601(k)(1) | 4,200 |
| Failure to keep and maintain records of periodic retest | 178.601(k)(2) | 4,200 |
| Manufacturing DOT specification packaging after October 1, 1994 | N/A | 3,000 and up |
| Manufacturer Requirements—Fiberboard Boxes: | | |
| Manufacturing, marking, certifying, or selling a package marked to a specification, UN standard, or an exemption when applicable requirements are not met. | N/A | 4,300 to 7,200 |
| Certifying packaging as meeting UN 4G standard when it was not properly conditioned before design qualification testing. | N/A | 4,300 |
| Failure to properly mark a fiberboard box | N/A | 1,200 |
| Manufacturing Requirements—UN 1H1 Drums: | | |
| Failure to properly conduct alternate leakproofness test | N/A | 4,200 |
| Manufacturing Requirements—DOT High-Pressure Cylinders: | | |
| Manufacturing, representing, marking, certifying, or selling a DOT high-pressure cylinder that was not inspected and verified by an approved independent inspection agency. | N/A | 6,000 to 10,800 |
| Manufacturing Requirements—Spec. DOT 39 Cylinders: | | |
| Failure to have a registration number/failure to mark it on the cylinder | N/A | 3,700 |
| Marking another company's number on a cylinder | N/A | 5,000 |

| Violation description | Section or cite | Baseline assessment |
|---|-----------------|---------------------|
| Failure to mark the date of manufacture or lot number on a cylinder | N/A | 3,100 |
| Failure to have a chemical analysis performed in the U.S. for a material manufactured outside the U.S./failure to obtain a chemical analysis from the foreign manufacturer. | N/A | 5,000 |
| Failure to conduct a complete visual internal examination | N/A | 3,500 to 5,200 |
| Failure to conduct a flattening test | N/A | 5,200 |
| Failure to conduct a burst test | N/A | 5,200 |
| Failure to properly conduct required test. | N/A | 4,200 |
| Failure to maintain a required inspector's report | N/A | 5,200 |
| Failure to maintain an accurate inspector's report | N/A | 1,200 to 3,700 |
| Manufacturing Requirements—DOT 4B Cylinders: | | |
| Failure to conduct a hydrostatic test by water jacket method on one cylinder out of each lot of 200 or less. | 178.50–14 | 5,200 |
| Failure to conduct a flattening test | 178.50–15 | 5,200 |
| Failure to conduct physical testing | 178.50–16 | 5,200 |
| Failure to properly conduct required test | N/A | 4,200 |
| Failure to maintain the required Inspector's report | N/A | 5,200 |
| Failure to maintain an accurate Inspector's report | N/A | 1,200 to 3,700 |
| Manufacturing Requirements—Steel Drums: | | |
| Failure to pass testing conducted in plant | N/A | 5,200 and up |
| Failure to properly conduct "solution over partial seams" test | N/A | 3,500 to 5,000 |
| Failure to retain chime cuts when conducting "solution over partial seams" testing | N/A | 3,100 |

Other Requirements

| | | |
|--|-----------------------------------|------------------|
| Offeror Requirements (General): | | |
| Offering a hazardous material for transportation in an unauthorized, nonspecification, or nonstandard packaging. | N/A | 5,200 to 8,650 |
| Offering a hazardous material for transportation in an unauthorized, nonstandard, or nonspecification inner package. | N/A | 4,300 |
| Offering a hazardous material for transportation in a packaging that leaks during conditions normally incident to transportation. | N/A | 10,400 |
| Offering a hazardous material for transportation that is covered by an exemption, without complying with its terms. | N/A | 5,200 to 8,650 |
| Offering a hazardous material for transportation in a packaging marked as manufactured to a DOT specification where that packaging was manufactured after October 1, 1994. | 171.14 | 3,000 and up |
| Offeror requirements (Class 1 (Explosives)): | | |
| Failing to mark the "EX" approval number on a package containing an explosive | 172.320 | 1,200 |
| Offering an unapproved explosive for transportation | 173.54(a) and 173.56(b) | 10,000 to 25,000 |
| Offering a leaking or damaged package of explosives for transportation | 173.54(c) | 10,000 to 25,000 |
| Offering a Division 1.3 (Class B) explosive for transportation that is misclassified as Division 1.4 (Class C) explosive. | N/A | 8,400 and up |
| Offeror Requirements (Class 3 (Flammable Liquid)): | | |
| Using an incorrect marking for the flashpoint in order to be excepted from specification packaging, for a flammable liquid with a flash point of 73° Fahrenheit or higher. | 173.118(b) ¹ | 1,000 |
| Offering a flammable liquid with a flash point below 20° Fahrenheit for transportation in an unauthorized DOT 17E drum (20/18-gauge v. 18-gauge). | 173.119(a)(3) ¹ | 6,200 |
| Offering a flammable liquid with a flash point of 73° Fahrenheit or above in nonspecification packaging, without marking the flash point or an indication that it was at or above 73° Fahrenheit on the packaging. | N/A | 3,600 to 5,200 |
| Offeror Requirements (Division 6.1 (Poisonous Liquids)): | | |
| Offering a poisonous liquid for transportation in a DOT 12A fiberboard box that was tested as required by § 178.210–10. | 173.346(a)(26) ¹ | 5,200 |
| Offeror Requirements (Class 7 (Radioactive Materials)): | | |
| Failure to have a valid U.S. NRC approval certificate authorizing the use of a packaging as Type B (never having obtained one). | 173.415(c) | 4,300 |
| Failure to have a valid U.S. NRC approval certificate authorizing the use of a packaging as Type B (previously had one, but now expired). | 173.415(c) | 3,500 and up |
| Offeror Requirements (Portable or IM Tanks): | | |
| Offering a hazardous material for transportation in a DOT 57 or exemption portable tank that is out of test. | 173.32(e)(1)(ii) | 6,200 |
| Offering a compressed gas for transportation in a DOT 51 portable tank that is out of test (may be higher if offeror is also owner and portable tank has not been tested at all, or not for a long time). | 173.32(e)(l)(i) 173.315(a) | 5,200 to 8,650 |
| Offeror Requirements (Cylinders): | | |
| Offering a compressed gas for transportation in a cylinder that is out of test (may be higher if offeror is also owner and cylinder has not been retested at all, or not for a long time). | 173.301(c) | 5,200 to 8,650 |
| Failure to check each day the pressure of a cylinder charged with acetylene that is representative of that day's compression, after the cylinder has cooled to a settled temperature, or failure to keep a record of this test for at least 30 days. | 173.303(d) | 4,200 |

| Violation description | Section or cite | Baseline assessment |
|--|--------------------------|---------------------|
| Offering a mixture of a non-hazardous material and a compressed gas as an ORM-D without properly determining the internal pressure at equilibrium in a water bath heated to 130° Fahrenheit. | 173.1200(a)(ii)(E) | 6,200 |
| Carrier Requirements: | | |
| Transporting railway track torpedoes outside of flagging kits, in violation of E-7991 | N/A | 6,000 |
| Transporting explosives in a motor vehicle containing metal or other articles or materials likely to damage such explosives or any package in which they are contained, without segregating in different parts of the load or securing them in place in or on the motor vehicle and separated by bulkheads or other suitable means to prevent such damage. | 177.835(i) | 5,200 |
| Exemptions: | | |
| Requested renewal of an exemption prior to expiration, but shipped after expiration | N/A | 2,500 |
| Offered or transported a packaging or otherwise performed a function covered by an exemption after an exemption had expired (less than one year). | N/A | 2,900 |
| Offered or transported a packaging or otherwise performed a function covered by an exemption after an exemption had expired (more than one year). | N/A | 3,600 to 7,200 |

¹ Cite refers to provisions in effect September 30, 1991 (see 49 CFR Part 173, revised as of October 1, 1990).

III. Consideration of Statutory Criteria

A. These guidelines are used by the Office of Hazardous Materials Safety (OHMS) in setting initial proposed penalties for hazmat violations. They indicate baseline amounts or ranges for probable violations frequently cited in enforcement reports and set forth general OHMS policy for considering statutory criteria.

B. The initial baseline determination partially considers the nature, extent, circumstances, and gravity of the alleged violation. That determination then is adjusted to consider all other evidence concerning the nature, extent, circumstances, and gravity of the alleged violation; degree of culpability; history of prior violations; ability to pay; effect of the penalty on ability to continue to do business; and such other matters as justice may require (a major component of which is corrective action taken by a respondent to prevent a recurrence of similar violations). In making a penalty recommendation, the baseline or range may be increased or decreased on the basis of evidence pertaining to these factors.

C. The following miscellaneous factors are used to implement one or more of the statutory assessment criteria.

IV. Miscellaneous Factors Affecting Penalty Amounts

A. Corrective Action

1. A proposed penalty is mitigated for documented corrective action of alleged violations taken by a respondent. Corrective action may occur: (1) After an inspection and before a Notice of Probable Violation (NOPV) is issued; (2) on receipt of an NOPV; or (3) after receipt of an NOPV (possibly after it is solicited by an RSPA attorney). In general, corrective action may reduce a penalty up to 25%. Mitigation may be taken into account in the referral memo or may be recommended prior to issuance of an Order by RSPA's Chief Counsel.

2. The two primary factors in determining the penalty reduction are extent and timing of the corrective action. In other words, mitigation will be determined on the basis of how much corrective action was taken and when it was taken. Systemic action to prevent future violations is given greater

consideration than action simply to remedy violations identified during the inspection.

3. Mitigation is applied to individual violations. Thus, in a case with two violations, if corrective action for the first violation is more extensive than for the second, the penalty for the first will be mitigated more than that for the second.

B. Respondents That Re-Ship

A shipper that reships materials received from another company, in the same packaging and without opening or altering the package, independently is responsible for ensuring that the shipment complies with Federal hazmat law, and independently may be subject to enforcement action if the package does not comply. Nevertheless, the reshipper is considered to have a lesser level of responsibility for compliance in those respects in which it reasonably relies on the compliance of the package as received. In most cases of this type, OHMS will discount the applicable baseline standard by about 25%. The specific knowledge and expertise of all parties must be considered in discounting for reliance on a prior shipper. This discount is applied before any consideration of mitigation based on corrective action.

C. Penalty Increases for Multiple Counts

Under the Federal hazmat law, 49 U.S.C. 5213(a), each violation of the HMR and each day of a continuing violation (except for violations pertaining to packaging manufacture or qualification) is subject to a civil penalty of up to \$25,000. Absent aggravating factors, OHMS, in its exercise of discretion, ordinarily will apply a single penalty for multiple counts or days of violation. In a number of cases, particularly those involving shippers, an inspector may cite two or more similar packaging violations for different hazardous materials. For example, the inspector may cite the same marking violation for two or more packages. OHMS usually will consider those additional violations as counts of the same violation and will not recommend multiples of the same baseline penalty. Rather, OHMS usually will recommend the baseline penalty for a single violation, increased by 25% for each additional violation.

D. Financial Considerations

1. Mitigation is appropriate when the baseline penalty would (1) exceed an amount that the respondent is able to pay, or (2) have an adverse effect on the respondent's ability to continue in business. These criteria relate to a respondent's entire business, and not just the product line or part of its operations involved in the violation(s). Beyond the overall financial size of the respondent's business, the relevant items of information on a respondent's balance sheet include the current ratio (current assets to current liabilities), the nature of current assets, and net worth (total assets minus total liabilities).

2. These figures are considered on a case-by-case basis. In general, however, a current ratio close to or below 1.0 means that the company may have difficulty in paying a large penalty, and may justify reduction of the penalty or an installment payment plan. A small amount of cash on hand representing limited liquidity, even with substantial other current assets (such as accounts receivable or inventory), may warrant a short-term payment plan. Respondent's income statement also will be reviewed to determine whether a payment plan is appropriate.

3. Many companies are able to continue in business for extended periods of time with a small or negative net worth, and many respondents have paid substantial civil penalties in installments even though net worth was negative. For this reason, negative net worth alone does not always warrant reduction of a proposed penalty or even, in the absence of factors discussed above, a payment plan.

4. In general, an installment payment plan may be justified where reduction of a proposed penalty is not, but the appropriateness of either (or both) will depend on the circumstances of the case. The length of a payment plan should be as short as possible, but the plan may consider seasonal fluctuations in a company's income if the company's business is seasonal (e.g., swimming pool chemical sales, fireworks sales) or if the company has documented specific reasons for current non-liquidity.

5. Evidence of financial condition is used only to decrease a penalty, and not to increase it.

E. Penalty Increases for Prior Violations

1. The baseline penalty presumes an absence of prior violations. If prior violations exist, generally they will serve to increase a proposed penalty. The general standard for increasing a baseline proposed penalty on the basis of prior violations is as follows:

- a. One prior case—25% increase over the pre-mitigation recommended penalty
- b. Two prior cases—50% increase over the pre-mitigation recommended penalty
- c. Three prior cases—75% increase over the pre-mitigation recommended penalty
- d. Four or more prior cases—100% increase over the pre-mitigation recommended penalty

2. A case of prior violations closed more than five years previously normally will not be considered in determining a proposed penalty.

F. Penalty Increases for Use of Expired Exemptions

Adjustments to the base line figures for use of expired exemptions can be made depending on how much material has been shipped during the period between the expiration date and the renewal date. If the company previously has been found to have operated under an expired exemption, the penalty is normally doubled. If the company has been previously cited for other violations, the penalty generally will be increased by about 25%.

Issued in Washington, DC on February 27, 1995 under authority delegated in 49 CFR part 1.

Ana Sol Gutiérrez,

Deputy Administrator, Research and Special Programs Administration.

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Federal Highway Administration**49 CFR Part 393**

[FHWA Docket No. MC-94-28]

Parts and Accessories Necessary for Safe Operation; Glazing and Window Construction; Petition for Waiver To Permit Use of Automatic Vehicle Identification Transponder

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Grant of petition for waiver.

SUMMARY: The FHWA is granting a petition from the Commonwealth of Kentucky, lead State for the ADVANTAGE I-75 Program, and Heavy Vehicle Electronic License Plate, Inc., (HELP) requesting a waiver from the requirements of the Federal Motor Carrier Safety Regulations (FMCSRs) to allow mounting of an automatic vehicle identification (AVI) transponder near the upper border at the approximate center of the windshields of commercial motor vehicles.

The FHWA is granting the waiver to permit the use of the transponders in commercial motor vehicles participating in the ADVANTAGE I-75 operational ("beta") test and the HELP corridor programs, subject to the conditions imposed in this notice.

EFFECTIVE DATE: April 5, 1995.

FOR FURTHER INFORMATION CONTACT: Ms. Deborah M. Freund, Office of Motor Carrier Standards, (202) 366-2981, or Mr. Charles Medalen, Office of the Chief Counsel, (202) 366-1354, Federal Highway Administration, Department of Transportation, 400 Seventh Street SW., Washington, D.C. 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:**Background**

On October 12, 1994, the FHWA published a notice in the **Federal Register** (59 FR 51540) requesting comments on petitions received from the Commonwealth of Kentucky (Kentucky) and HELP. The petitioners are the lead organizations in multi-State partnerships of public and private sector interests conducting a series of operational tests that fall within the Commercial Vehicle Operations (CVO) element of the Intelligent Transportation System (ITS) Program (formerly known as the Intelligent Vehicle-Highway Systems (IVHS) program). The ADVANTAGE I-75 and HELP programs were created to allow commercial motor vehicles (CMVs) that are equipped with transponders and that comply with safety and administrative requirements to travel any segment of their respective instrumented highways at mainline speeds with minimal stopping at weight/inspection checkpoints.

The AVI device proposed for use in both programs is an electronic transponder designed to send and receive signals from a CMV to ports of entry (POEs) and safety inspection sites. The devices would be used to transmit a variety of information, such as the identity of the motor carrier, the gross weight of the vehicle, and the status of the vehicle's registration and fuel tax payments. The transponder measures 84 mm (3.3 inches) high by 112 mm (4.4 inches) wide by 38 mm (1.5 inches) deep.

In order to function effectively, the transponder must be able to properly transmit and receive signals from roadside receivers installed at States' ports of entry. The physical location of the transponder is a critical factor in its operation because of the potential for internal and external electronic

interference. In addition, the device must be placed in a suitable location to allow drivers to read the instruction displayed on the transponder, i.e., to enter or to bypass the POE. An engineering evaluation performed by one of the ADVANTAGE I-75 electronic equipment contractors determined that a location near the center of the upper border of the windshield best allowed the device to meet both of these requirements.

However, 49 CFR 393.60(c) requires that no motor vehicle be operated with any label, sticker, decalomania, or other vision-reducing matter covering any portion of its windshield or windows at either side of the driver's compartment, except that stickers required by law may be affixed to the bottom of the windshield, provided that no portion of any label, sticker, decalomania, or other vision-reducing matter may extend upward more than 114 mm (4.5 inches) from the bottom of the windshield. The requirements of § 393.60, particularly the 114 mm (4.5 inch) limit specified in § 393.60(c), are independent of the physical dimensions of windshields.

Section 206(f) of the Motor Carrier Safety Act of 1984 (49 U.S.C. 31136(e), formerly 49 U.S.C. app. 2505(f)) authorizes waivers of any regulation issued under the authority of that Act upon a determination that the waiver is consistent with the public interest and the safe operation of commercial motor vehicles.

The FHWA proposed to grant the waiver on October 12, 1994. The notice described the agency's review of automotive engineering recommended practices, the National Highway Traffic Safety Administration's Federal Motor Vehicle Safety Standards, and recent research concerning drivers' field of view. It also examined current CMV cab designs related to placement of interior mirrors and sunvisors which occupy approximately the same space proposed for the AVI transponder. Based on the information obtained from this review, the FHWA concluded that a transponder mounted at the approximate center of the top of the windshield would be extremely unlikely to create a situation inconsistent with the safe operation of a CMV. This location is well outside the area recommended for windshield wiper sweep under the Society of Automotive Engineers (SAE) Recommended Practice J198 (Windshield Wiper Systems—Trucks, Buses, and Multipurpose Vehicles) and the area recommended for windshield defrosting under Recommended Practice J342 (Windshield Defrosting Systems Performance Guidelines—Trucks,